

*Federal Civil Rule One and More --
A Change in Culture, Cost, and Complexity
(New Federal Rules of Civil Procedure)*



Sponsored by the
Federal Bar Association
Northern District of Ohio Chapter

Monday, December 14, 2015
9:00 AM to 10:30 AM

Carl B. Stokes U.S. Courthouse
Seventh Floor Auditorium

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Summary of Program

On December 1, 2015, a sweeping set of amendments to the Federal Civil Rules will take effect. These amendments grew out of a nationwide concern that the cost of civil litigation in federal courts had become prohibitively high, and that discovery demands and obligations were no longer commensurate with the stakes involved in the case. This program outlines those amendments from the perspective of Bench and Bar, and examines how the changes may further the promise of Federal Civil Rule One for “the just, speedy, and inexpensive determination of every action and proceeding.”

AGENDA

8:30 AM to 9:00 AM **Registration**

9:00 AM to 10:30 AM **An Overview on the Amendments to the new Federal Rules, and a discussion of their practical impact from the perspective of the trial lawyers and the judge.**

Honorable Jack Zouhary

United States District Court for the Northern District of Ohio and Member of Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

R. Eric Kennedy

Weisman, Kennedy & Berris Co., L.P.A

Rita A. Maimbourg

Tucker Ellis, LLP

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Judge Zouhary will outline the new rule changes and moderate a discussion with Panelists Eric Kennedy and Rita Maimbourg. Audience participation will be encouraged during the panel discussion.

SPEAKER BIOS

Eric Kennedy graduated from St. Lawrence University ('77) and received his law degree from Case Western Reserve University Law School ('80). He joined Weisman, Kennedy & Berris Co., L.P.A. over thirty years ago and has been Managing Partner since 1996. Eric's practice is focused on litigating individual medical malpractice, product liability, and security fraud actions, and he has held leadership roles in mass tort cases. Eric has been recognized in "Top 10 Civil Litigators in Ohio" (National Law Journal, March 2000), Ohio Super Lawyers (2002–2010) and Best Lawyers in America (1989–2010). Eric is an invited member of the John M. Manos American Inn of Court, International Academy of Trial Lawyers, American College of Trial Lawyers and the International Society of Barristers.

Rita Maimbourg graduated *magna cum laude* from University of Pittsburgh ('78) and received her law degree from Case Western Reserve University Law School ('81), *order of the coif*. A transplant to Cleveland in 1978, Rita is a Partner at Tucker Ellis LLP. She combines her trial experience and medical knowledge to defend clients in the pharmaceutical, medical device, and healthcare industries, and has special expertise in defending recalled products, opioids, transdermal drugs, and medical devices. Rita has been recognized in Ohio Super Lawyers (2005–2015), Best Lawyers in America (2012–2016), a Litigation Star (Benchmark Litigation, 2015–2016), and Top 250 Women in Litigation (2014–2015). She is a Fellow of the American College of Trial Lawyers, a Master Benchler of the Hon. William K. Thomas American Inn of Court, a member of the Judicial Selection Committee of the Cleveland Metropolitan Bar Association, and a Life Member of the Judicial Conference of the Eighth Judicial District of Ohio.

Jack Zouhary graduated *cum laude* from Dartmouth College ('73) and returned to his hometown for a law degree from the University of Toledo ('76) where he was Associate Editor of the Law Review. He was in private practice with RCO Law, a mid-size regional law firm, until January 2000 when he took a position as Senior Vice President and General Counsel for S. E. Johnson Companies. He was appointed by the Ohio Governor to the state trial court bench in March 2005, and was nominated by the President to the federal District Court in December 2005 with unanimous Senate confirmation in March 2006. He has served as a visiting district court judge in Michigan, Texas, Arizona, California and Connecticut, and by assignment on the Sixth and Ninth Circuit Court of Appeals. Judge Zouhary is a Judicial Fellow of the American College of Trial Lawyers and served on its Joint Task Force with IAALS (Institute for the Advancement of the American Legal System) on Discovery and Civil Justice. He currently serves on the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He led the effort in 2009 to establish the first Reentry Program for ex-offenders in the Northern District of Ohio, and promotes the teaching of civics by holding Naturalization Ceremonies throughout the Western Division at schools and other public forums. He is a Master in the Morrison Waite Chapter of the Inns of Court.



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History Behind the Civil Rule Changes

- Reduce cost and delay
- Rein in discovery -- more proportional and cooperative
- Increase judges' role from start to finish

What makes these changes different from prior changes?

- Reinventing how we practice law as lawyers and judges to benefit clients, courts, and our profession
- A culture change necessary as the practice of law has moved from a profession to a business

Package of Rule changes geared to rebuild the system with a focus on:

- Civility and collegiality
- Better discovery practices
- Engaged and accessible judges
- Utilizing court personnel effectively and efficiently
- Smart use of technology
- Valuing the system, including juries

Duke Amendments

- Process began with 2010 Duke Conference on Civil Litigation -- in response to concerns about the cost of litigation
- Recent changes sent to Congress following a four-year effort by the Civil Rules Committee

- Advisory Committee conducted public hearings in 2013-14
- 120 testifying witnesses during sessions in D.C., Phoenix and Dallas
- 2,300 written comments from individuals and groups

- Revised proposals submitted to the Judicial Conference -- approved the changes in Nov 2014
- Supreme Court adopted the proposed Amendments in Feb 2015
- Forwarded to Congress -- effective Dec 2015

Rules Committee developed proposals focused on:

- Improved case management
- Proportionality
- Cooperation in discovery
- Preservation of e-discovery (spoliation)

Rule 1

- “Just, speedy, and inexpensive determination of every action and proceeding”
- Amendment requires “court and the parties to secure” these goals
- Culture of cooperation
- Discourages “abuse of procedural tools that increase cost and result in delay”

Case Management

- Judges (and chambers staff) bear responsibility to manage cases early and actively

Rule 4(m) reduces time for service of process from 120 to 90 days

- Reduce delay at the beginning of a case
- Does not apply to service in a foreign country
- Docket Intake Form
 - Original Filing or Removal
 - Jurisdiction
 - CMC Requirements

Rule 16(b)(1) Scheduling Conference

- Modified by striking reference to conferences by “telephone, mail, or other means”
- Intended to encourage direct discussions between parties, counsel, and the court
- Conference may be held in person, by phone or video

Timing of Scheduling Order

- Judge required under Rule 16(b)(2) to issue Scheduling Order no later than 90 days after service on defendant(s)
- Earlier phone call initiated by court with counsel to discuss case specifics

Pre-Motion Conferences

- Rule 16(b)(3)(B) amended to permit a court to require counsel to request a conference with the court before moving for a discovery order
- Efficient way to resolve most discovery disputes without delay and expense

Rule 26(d)(2)

- New provision allows delivery of Rule 34 requests prior to the meet and confer required by Rule 26(f)
- But response time does not commence until after the Rule 26(f) conference
- Designed to facilitate focused discussion of discovery during the conference

Preservation

- Changes to Rule 26(f)(3)(C) and Rule 16(b)(3)(B) require parties to discuss:
 - Disclosure
 - Discovery
 - Preservation of ESI
 - Evidence Rule 502 Agreements (privilege waiver)

- Rule 37(e) recognizes duty to preserve discoverable information before suit is filed
- Parties should promptly seek court guidance if they cannot agree on preservation

Scope of discovery refined in Rule 26(b)(1)

- Scope of discovery is defined as “relevant” to claim or defense and “proportional to needs of the case”
- The phrase “reasonably calculated to lead . . .” is deleted as unnecessarily confusing -- that phrase was not meant to define the scope of discovery, but many have read it that way
- Information need not be admissible to be discoverable

What does “Proportional” mean?

- Importance of issues at stake
- Amount in controversy
- Access to relevant information
- Resources
- Whether burden or expense outweighs likely benefit
- Importance of discovery in resolving issues

Discovery requests and depositions

- No significant changes to Rules 30, 31, 33 and 36
- But Committee Notes cross reference proportionality factors (*e.g.*, for additional depositions)

Production of Documents Rule 34(b)(2)(B)

- Responses must state objection with “specificity . . . including reasons”
- Objection must state whether responsive materials are withheld
- Amended responses may be more common

ESI

- Changes in search capability and cost-shifting have accompanied growth of electronic discovery
- Rules endorse use of computer-based methods of searching information to address proportionality concerns in cases involving large volumes of ESI

Rule 37(e) / Spoliation

- Applies only to electronically stored information; not to tangible evidence
- Does not preclude sanctions for attempted destruction of tangible evidence under inherent power of court
- Based on common law duty to preserve; Sixth Circuit approves negligence standard for imposing sanctions

Curative measures apply if ESI is “lost.”

- Precludes sanctions if can be “restored or replaced through additional discovery”
- The intentional but incompetent spoliator
- Applies only to a party -- who “failed to take reasonable steps to preserve”
- Proportionality a factor in reasonableness, as well as party resources

Rule 37(e) Sanctions

Four findings needed:

- ESI should have been preserved
- ESI is lost
- Party failed to take reasonable steps to preserve
- ESI cannot be restored or replaced

If meet four criteria,
plus Rule 37(e)(1)

- “Prejudice to another party . . .” then sanctions should be “no greater than necessary to cure the prejudice”
- Prejudice may turn on importance of lost information
- Sanctions include: designating facts; prohibiting argument or evidence; striking pleadings; allow consideration of missing evidence; jury instructions; dismissal

Or another plus factor
Rule 37(e)(2)

- “Acted with the intent to deprive another party of the information’s use in the litigation” -- more than mere negligence, and regardless of prejudice
- Court may -- not must -- impose a severe sanction such as: adverse inference JI; presume lost information unfavorable; dismissal or default
- “Remedy should fit the wrong”
- Issue of intent for judge or jury?

